

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Fones4AllCorp.	)	
Petition for Expedited Forbearance	)	
Under 47 U.S.C. § 160(c) and Section 1.53	)	
From Application of Rule 51.319(d)	)	WC Docket No. 05-261
To Competitive Local Exchange Carriers Using	)	
Unbundled Local Switching to Provide Single	)	
Line Residential Service to End Users Eligible	)	
For State or Federal Lifeline Service	)	

**BELLSOUTH'S OPPOSITION**

BellSouth Corporation, on behalf of its wholly owned affiliates ("BellSouth"), files its comments opposing the Petition for Expedited Forbearance ("Petition") filed by Fones4All Corporation ("Petitioner").<sup>1</sup> The Petition is an improper attempt to reconsider a final agency decision and to supplant the rulemaking provisions of the Administrative Procedure Act in order to establish new and burdensome regulations on incumbent local exchange carriers ("ILECs") in derogation of the law.

Petitioner seeks forbearance from Rule 51.319(d), which provides, among other things, that an ILEC is not required to provide unbundled access to local circuit switching for the purpose of serving end-user customers using DS0 capacity loops, on behalf of both "single line Lifeline eligible customers of CLECs" and of "carriers who seek to serve single line residential

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<sup>1</sup> *Pleading Cycle Established for Comments on Petition for Forbearance of Fones4All Corp. Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 05-261, *Public Notice*, DA 05-2288 (rel. Aug. 15, 2005).

Lifeline eligible end users” using the unbundled network element platform, or UNE-P.<sup>2</sup> This request is based on two fundamental misapprehensions of the law. First, it is fundamentally inconsistent with the statute to forbear from a decision not to regulate. Forbearance under the provisions cited by petitioners applies only in the context of affirmative regulatory obligations, and there is no affirmative regulatory obligation for ILECs to provide unbundled local switching and, as a result, UNE-P. Congress gave the Commission specific forbearance authority in order to decrease, not increase, regulation. Second, elimination of Rule 51.319(d) through forbearance will not restore the *status quo ante* the *Triennial Review Remand Order*. The Commission’s UNE-P regime was vacated three times by federal courts, and there is (and never was) any *prima facie* requirement that ILECs provide unbundled mass market switching that would apply in any “void” created by forbearance. Because there is no general obligation to unbundle, elimination of the rules from which Petitioners seek forbearance would not and could not lawfully result in additional unbundling. The scope of an ILEC’s unbundling obligations can only be determined consistent with the impairment standard set forth in section 251(d)(2) and implemented pursuant to section 251(c)(3), after full notice and comment rulemaking pursuant to the Administrative Procedures Act.

Although couched as a request for forbearance (expedited, at that), the petition is nothing more than an attempt to have the Commission partially reconsider the unbundled switching

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<sup>2</sup> Petition at 14-15. The statute authorizes submission of petitions by carriers or classes of carriers for the exercise of forbearance authority “with respect to that carrier or those carriers, or any service offered by that carrier.” 47 U.S.C. § 160(c). It does not appear to authorize petitions submitted on behalf of end-users or services that may be taken by end-users.

determinations made in its *Triennial Review Remand Order*.<sup>3</sup> Because the instant petition was filed with the Commission well after the statutory deadline for filing petitions for reconsideration, the Commission has no discretion to entertain the partial reconsideration requested, however the pleading itself may be styled, and it must be dismissed.

## **I. THE TELECOMMUNICATIONS ACT DOES NOT AUTHORIZE THE RELIEF SOUGHT**

There can be no serious dispute that Petitioners' request for forbearance is designed to impose additional unbundling obligations upon ILECs. Petitioners concede the point, requesting that the Commission exercise its forbearance authority so as "to immediately provide that UNE-P be required to be provided to CLECs in the instance where a CLEC's customer qualifies for universal Lifeline support for a single residential line."<sup>4</sup> However, the expansion of an ILEC's unbundling obligations through a forbearance petition is not authorized by section 10.

Section 10 only authorizes the Commission to eliminate affirmative regulatory obligations under certain circumstances.<sup>5</sup> As the federal courts uniformly have recognized in reviewing the Commission's prior attempts at crafting lawful unbundling rules, however, there is no general obligation to unbundle.<sup>6</sup> Because overbroad unbundling rules hamper investment and undermine facilities-based competition, the scope of the ILEC's duty to unbundle in section

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<sup>3</sup> *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, *Order on Remand*, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*").

<sup>4</sup> Petition at 7.

<sup>5</sup> 47 U.S.C. § 160(a).

<sup>6</sup> *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 387 (1999); *USTA v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003); *USTA v. FCC*, 359 F.3d 554, 576 (D.C. Cir.) ("*USTA II*") (Congress's goal was not "to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate"), *cert. denied*, 125 S. Ct. 313 (2004).

251(c)(3) is constrained by the impairment standard in section 251(d)(2), and any unbundling rules adopted by the Commission must be consistent with these provisions.

Because there is no pre-existing unbundling obligation, “forbearance” from the limitations on unbundling about which Petitioners complain could not lawfully result in the additional unbundling Petitioners seek. On the contrary, any decision by the Commission to expand the unbundling requirements to which ILECs must adhere could only be accomplished through a lawful impairment analysis conducted consistent with sections 251(c)(3) and 251(d)(2), which is plainly outside the scope of a forbearance petition.

## **II. THE PETITION FAILS TO SATISFY THE REQUIREMENTS OF SECTION 10**

Even assuming that forbearance was an appropriate vehicle for revisiting the Commission’s unbundling rules as requested by petitioners (which is not the case), petitioners have utterly failed to satisfy the requirements for forbearance. Petitioners argue no new facts to support their forbearance petition, and merely aping the statutory language of section 10 and rearguing points considered and rejected by the Commission is insufficient.<sup>7</sup>

The petitioner’s strategy is to attempt to bootstrap and conflate the Congress’ and the Commission’s concern for universal service with the specific deregulatory provisions of Section 10. But petitioner’s strategy is unavailing. Petitioners candidly acknowledge in their petition the existence of the Commission’s ongoing and existing universal service docket.<sup>8</sup> It is in this

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<sup>7</sup> Petition at 2 n.9, 11 n.25, 14 n.31, 15 n.33 and accompanying text (rearguing points made in *ex parte* communications during the *Triennial Review Remand* proceeding and rejected by the Commission).

<sup>8</sup> *Id.* at ii n.1 and accompanying text; *id.* at 2-3 nn.10-11, 6 n.17, 16 nn.34-36.

docket, and in analog state proceedings, where the petitioners should raise issues related to carrier reimbursements, which appear to be the motivating factor for the instant petition.<sup>9</sup>

### III. CONCLUSION

For the foregoing reasons, the Commission should deny the Petition for Expedited Forbearance.

Respectfully submitted,

**BELLSOUTH CORPORATION**

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Date: October 14, 2005

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<sup>9</sup> *Id.* at 7-10.

**CERTIFICATE OF SERVICE**

I do hereby certify that I have this 14th day of October 2005 served a copy of the foregoing **BELLSOUTH'S OPPOSITION** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed below.

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